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No. 06-1046

IN THE

Supreme Court of the United States

CETEWAYO ASKIA BRIGGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether *United States v. Booker*, 543 U.S. 220 (2005), announced a new rule under *Teague v. Lane*, 489 U.S. 288 (1989), or was dictated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

(2) Whether, if *Booker* announced a new rule, it applies retroactively on collateral review.

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Petitioner Cetewayo Askia Briggs respectfully submits this reply to the United States' Brief in Opposition to the Petition for Writ of Certiorari.

DISCUSSION

Petitioner's case presents an appropriate vehicle to determine whether *Booker* applies retroactively to cases on collateral review. Petitioner preserved the *Booker* issue first in his direct review papers, then in his § 2255 motion and, finally, in the appeal of the dismissal of his § 2255 motion. Contrary to the Government's arguments, there is no procedural bar to Petitioner's *Booker* claim.

I. PETITIONER RAISED THE *BOOKER* ISSUE IN HIS INITIAL § 2255 MOTION

The Government argues that Petitioner "raised his sentencing claim for the first time in a supplemental motion for certificate of appealability in the court of appeals." Br. in Opp'n at 5. This assertion is incorrect. Petitioner raised his sentencing claim throughout his direct review and in his § 2255 motion.

At each stage of his direct review, Petitioner claimed his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). During his sentencing hearing on August 23, 2000, Petitioner argued that *Apprendi* prohibited the district court from determining by a preponderance of the evidence facts that would raise his maximum sentence -- the very issue that ultimately was decided in favor of his position in *United States v. Booker*, 543 U.S. 220 (2005). Pet. App. 41a. The district court disagreed and determined the quantity of cocaine base involved in Petitioner's offenses by a preponderance of the evidence. *Id.* at 42a. Petitioner then appealed his conviction and sentence to the Sixth Circuit, which rejected Petitioner's *Booker*-like arguments and held that the district court did not violate *Apprendi*. Pet. App. 26a-27a. This Court denied certiorari on April 15, 2002. Pet. App. 18a.

When Petitioner filed his first (and only) motion under 28 U.S.C. § 2255 nearly one year later, he preserved the *Booker* issue for collateral review. On March 31, 2003, Petitioner, acting pro se, moved to vacate, set aside, or correct his sentence based on "a denial of Petitioner's 5th Amendment right to Due Process and 6th Amendment rights to effective assistance of counsel and a fair trial by an impartial jury." Motion to Vacate, Set Aside, or Correct Sentence at 2, Briggs v. United States, No. 03-cv-00215-RHB (W.D. Mich. Mar. 31, 2003). Petitioner enumerated the facts underlying his *Booker* claim: "No instruction was given to the jury about quantity; rather the jury was instructed that the penalty would be determined by the Court." *Id.* at 14; *accord* Br. in Opp'n at 2. Petitioner clearly pleaded the facts and constitutional violations underlying his *Booker* claim.

Petitioner needed to plead no more in order to adequately preserve his *Booker* claim for collateral review. As the Court has stated, "a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action . . . ." *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled-in-part on other grounds*, *Lewis v. Casey*, 518 U.S. 343, 354 (1996); *accord Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977); *Guidroz v. Lynaugh*, 852 F.2d 832, 834 (5th Cir. 1988); *Franklin v. Rose*, 765 F.2d 82, 85 (6th Cir. 1985) (per curiam); *see also McNeil v. United States*, 508 U.S. 106, 113 (1993) (pro se pleadings should be liberally construed). By including the facts underlying his *Booker* claim in his § 2255 motion, Petitioner successfully raised the issue with the district court.

The Government does not suggest a method by which Petitioner could have better preserved the *Booker* issue. Petitioner fully litigated his *Apprendi* claims on direct review. Petitioner then included in his § 2255 motion the facts and constitutional doctrines necessary for further adjudication of his sentencing claim, consistent with *Bounds*, *supra*. After the district court rejected his § 2255 motion,

Pet. App. 13a-17a, Petitioner filed for a certificate of appealability ("COA") from the district court pursuant to 28 U.S.C. § 2253(c). Motion for Certificate of Appealability, Briggs v. United States, No. 03-cv-00215-RHB (W.D. Mich. Mar. 3, 2004). When this was denied, Br. in Opp'n at 3, Petitioner filed another motion for a COA with the Sixth Circuit. Motion for Certificate of Appealability, Briggs v. United States, No. 04-1315 (6th Cir. May 10, 2004). Several weeks later, the Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*, 542 U.S. 961 (2004). Petitioner immediately notified the Sixth Circuit that -- consistent with the position he had taken throughout his direct and collateral reviews -- he intended to claim his sentence was illegal in light of *Blakely*, and he sought to "amend" his motion for a COA, which the Government did not oppose. Motion for Leave to Amend Certificate of Appealability, Briggs v. United States, No. 04-1315 (6th Cir. Jul. 26, 2004). The Sixth Circuit then issued a COA specifically permitting Petitioner to argue that "his sentence is illegal in light of the Supreme Court's recent decision in *Blakely* . . . ." Pet App. 38a-39a.

Petitioner's claim is properly preserved for review by this Court.

II. PETITIONER DID NOT FILE A SECOND OR SUCCESSIVE MOTION UNDER 28 U.S.C. § 2255

The Government's contention that Petitioner's amended motion for a COA somehow rose to be a "second or successive" § 2255 motion within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is without merit. The Court's jurisprudence permits § 2255 petitioners to present additional claims after the initial pleading as long as they have "a legitimate excuse for failing to raise the claim at the appropriate time." *McClesky v. Zant*, 499 U.S. 467, 490 (1991), *reh'g denied*, 501 U.S. 1224 (1991). Several courts of appeals have

permitted habeas petitioners to argue previously-unavailable claims without requiring the petitioners to file "second or successive" habeas petitions. *E.g., Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993); *Diaz v. United States*, 930 F.2d 832, 835-36 (11th Cir. 1991); *Mayo v. Lynaugh*, 893 F.2d 683, 685 (5th Cir. 1990), *cert. denied, Collins v. Mayo*, 502 U.S. 898 (1991); *Giarratano v. Procunier*, 891 F.2d 483, 485-86 (4th Cir. 1989), *cert. denied,* 498 U.S. 881 (1990). The Government's authority illustrates the opposite situation, where a petitioner was foreclosed from raising an issue later that he could have argued in his initial pleading. *See United States v. Miles*, 25 Fed. App'x 773 (10th Cir. 2001).

Further, Rule 15 allows for liberal amendments in habeas pleadings. *See* Fed. R. Civ. P. 15, 81(a)(2); 28 U.S.C. §§ 2242, 2254, 2255. Rule 15 allows petitioners to amend their petitions after a responsive pleading has been filed "by leave of court . . . when justice so requires," Fed. R. Civ. P. 15(a), and allows adjudication of issues not raised in the pleadings by "express or implied consent" of the parties. *Id.* at 15(b). The Government cannot seriously contend that each amendment is itself a "second or successive" motion within the meaning of 28 U.S.C. § 2255, let alone that the amendment here was "second or successive" given that it was permitted by the Sixth Circuit and tried by implied (if not express) consent of the parties, *infra*.

The Government's argument is premised on a distortion of Petitioner's proper filing of an amended request for a COA with the court of appeals. Transforming that filing into a "second or successive" § 2255 motion requires two illogical jumps: (1) that the amended motion for a COA was actually an amended § 2255 motion, and (2) that the amended § 2255 motion was actually a *new* § 2255 motion, notwithstanding Rule 15's liberal amendment policies. There is no basis to construe Petitioner's amendment in that manner.

III. PETITIONER'S AMENDMENT WAS PROPERLY FILED IN THE COURT OF APPEALS

Petitioner followed the correct procedure by amending his motion for a COA with the Sixth Circuit. At that stage in his proceedings, Petitioner had no other alternatives. The district court had already denied his § 2255 motion, Pet. App. 13a-17a; therefore, he could not amend his § 2255 motion. Additionally, Petitioner's motion for a COA had already been denied by the district court. When Petitioner realized the Court's recent opinion in *Blakely* bolstered his sentencing claim, his sole remaining remedy was to amend the motion for a COA already pending with the Sixth Circuit.

The only issue bearing on whether the Sixth Circuit could hear Petitioner's appeal, including his amended sentencing claim, was whether he had made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 349 (2003) (Scalia, J., concurring). Although appellate courts do not ordinarily decide issues raised for the first time on appeal, there is often an exception made when "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Beavers v. Lockhart*, 755 F.2d 657, 662 (8th Cir. 1985). Several circuit courts have allowed habeas petitioners to argue claims on appeal that were not present in the district court proceedings. *E.g., United States ex. rel. McCall v. O'Grady*, 908 F.2d 170, 175 n.6 (7th Cir. 1990) (allowing § 2254 petitioner to raise issue for the first time on appeal when raised at "its earliest opportunity"); *Ross v. Kemp*, 785 F.2d 1467, 1478 (11th Cir. 1986) (permitting habeas petitioner to supplement the record on appeal); *Petty v. McCotter*, 779 F.2d 299, 302 (5th Cir. 1986), *cert. dismissed*, 480 U.S. 699 (1987) (allowing pro se habeas litigant to supplement factual basis for claim for first time on appeal); *Stephens v. Zant*, 631 F.2d 397, 406-07 (5th Cir. 1980), *rev'd on other grounds*, 462 U.S. 862 (1983)

(allowing habeas petitioner to raise on appeal grounds for relief not raised at the district court).

Contrary to the Government's assertions, Br. in Opp'n at 6, habeas corpus jurisdiction in the courts of appeals does not depend as much on the correct *procedures* being followed in lower courts as it does on whether the petitioner made a substantial showing of the denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."); *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Indeed, had the Government quoted the entirety of its citation from *Miller-El v. Cockrell*, Br. in Opp'n at 6, it confirms that the only "procedure" necessary for a court of appeals to rule on a § 2255 motion is whether a COA has been issued. *Miller-El*, 537 U.S. at 336 ("As a result, *until a COA has been issued* federal courts of appeals lack jurisdiction to rule on the merits of appeal from habeas petitioners.") (emphasis added). Because the Sixth Circuit issued a COA on Petitioner's *Blakely* claim -- without opposition from the Government -- that should end the inquiry.[1]

Petitioner also timely sought his amendment. *See* Br. in Opp'n at 5 n. 2. Even to the extent Petitioner's amended motion for a COA is viewed as an amended § 2255 motion (and it should not, *supra*), it would have been timely under Rule 15(c). According to *Mayle v. Felix*, 545 U.S. 644 (2005), "[s]o long as the original and amended petitions state claims that are tied to a common core of operative facts,

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[1] The Government's argument that the Sixth Circuit lacked authority to issue the COA depends entirely on its contention that Petitioner's amended motion for a COA constituted a "second or successive" motion. *See* 28 U.S.C. § 2244(b)(3)(C). Because Petitioner's amendment was not a "second or successive" motion, *supra*, the Sixth Circuit was within its authority to issue the COA.

relation back [under Rule 15(c)(2)] will be in order." *Id.* at 664. Petitioner's first (and only) § 2255 motion alleged the facts underlying his sentencing claim. *Supra.* There is no question that any "amendment" would have been tied to the same "common core of operative facts."

IV. THE GOVERNMENT WAIVED ANY OPPOSITION TO THE SIXTH CIRCUIT'S ISSUANCE OF A CERTIFICATE OF APPEALABILITY

When the Sixth Circuit issued a COA on January 11, 2005, Pet. App. 38a-39a, the Government could have objected that the Sixth Circuit lacked authority or jurisdiction, but chose not to do so. So, too, when the Government filed its brief at the Sixth Circuit on July 25, 2005, and when the Government argued its case before the Sixth Circuit on November 29, 2005. The Government chose not to contest the COA at any stage in the court below. *See* Final Brief for the United States at 7, Briggs v. United States, No. 04-1315 (6th Cir. July 25, 2005). Because it has waited over two years to contest the Sixth Circuit's authority, the Government has waived that objection.[2]

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[2] The Government contends it cannot waive these arguments because they are jurisdictional. Br. in Opp'n at 6 n.3. This contention is without merit. Since Petitioner did not file a "second or successive" motion, *supra*, the district court would have had jurisdiction to hear Petitioner's amended claims, and the Sixth Circuit was within its authority to issue a COA. *Contra Burton v. Stewart*, 127 S. Ct. 793, 796 (2007) ("Over three years subsequent . . . [petitioner] filed another federal habeas petition . . . ."). Even if the Government had a viable argument against jurisdiction in the district court, it is premature to raise it now before this Court grants certiorari. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("[When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.") (internal quotation marks omitted).

V. THE MERITS OF PETITIONER'S ARGUMENT FOR CERTIORARI REMAIN COMPELLING

For the reasons already explained in the Petition for Writ of Certiorari, the question of whether *Booker* should be applied retroactively to cases on collateral review could have important consequences for federal prisoners nationwide, as well as state prisoners subject to the *Blakely* decision.[3] Several courts of appeals have misapplied the Court's precedent in holding that *Booker*'s rule was not dictated by *Apprendi*, or, in the alternative, was not a new rule deserving retroactive application. This Court should set right the errors in the courts below.

The fact that *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), has been vacated is of no moment. This Court

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[3] As Petitioner has argued, Pet. 12 n.5, this Court's decision on *Booker*'s retroactivity would guide the lower courts in determining *Blakely*'s retroactivity as well. The Government attempts to distinguish the two cases by extracting a perceived "heightened standard of proof," Br. in Opp'n at 7 n.4, applicable to facts decided under *Blakely*. To the contrary, both *Booker* and *Blakely* require that facts raising a defendant's maximum sentence be admitted by the defendant or proved to a jury *beyond a reasonable doubt*. *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 301; *see also Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) ("This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."). The fact that *Booker* rendered the Federal Sentencing Guidelines advisory, *Booker*, 543 U.S. at 245-46, has no bearing on whether facts raising a defendant's maximum sentence must be determined by a jury beyond a reasonable doubt, as they must under *Apprendi*, *Blakely*, and *Booker*. Indeed, *Booker*'s "beyond a reasonable doubt" standard, as applied to facts that previously would have been determined under the Sentencing Guidelines by a preponderance of the evidence, is part of what makes *Booker* a watershed rule. Pet. 24-26.

vacated *Gomez* for further consideration in light of *Cunningham*. *Gomez v. Tennessee*, 127 S. Ct. 1209 (2007). *Cunningham* did not decide any questions related to retroactivity. Also, as already cited by Petitioner, Pet. 14, *Gomez* was not the only decision that would have afforded *Blakely/Booker* retroactive status. *See Smart v. State,* 146 P.3d 15, 54 (Alaska 2006) (Mannheimer, judge, concurring). Where there is disagreement this Court can resolve, and where courts below have ignored the Court's retroactivity precedent, it is appropriate for the Court to grant certiorari to resolve the issue.

CONCLUSION

For the reasons set forth herein and in Petitioner's opening petition, the Petition for Writ of Certiorari should be granted.

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